

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration	:	
	:	AAA Case No.
between	:	14 390 00610 10
	:	
CITY OF PHILADELPHIA,	:	Opinion & Award
	:	
“City”	:	Re: Discharge of
	:	Jason Belciano
- and -	:	
	:	Hearing: September 8, 2011
	:	
F.O.P. LODGE NO. 5,	:	
	:	
“Union”	:	
-----X	:	

APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Shant H. Zakarian, Esq., Assistant City Solicitor

For the Union

JENNINGS SIGMOND, P.C.
Marc L. Gelman, Esq., Of Counsel

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The Department discharged Police Officer Jason Belciano effective March 28, 2010, for violating Disciplinary Code §1.80 based upon his alleged use of a controlled substance, namely, the steroid nandrolone. The Union contends the City lacked just cause to impose this discipline. It asks that the discharge be reversed and all reference to it be expunged from Belciano's disciplinary record. In addition, it requests that Belciano be made whole for all pay and benefits lost.

The relevant facts of this case, including the areas of dispute, may be set forth succinctly:

Belciano has been a member of the Department for over three years. At the time of his discharge, Belciano had no prior discipline.

By policy, the Department has advised all officers that "the abusive and/or illicit use of drugs" will not be tolerated. (Union Exhibit 1.) To that end, §1.80 of the Department's Disciplinary Code specifies that the penalty for "the use of a controlled substance" shall be dismissal, except where prescribed by a licensed medical practitioner. (Joint Exhibit 2.)

In support of this rule, the Department has adopted Directive 55, which details when and how it will test sworn personnel for abusive and/or illicit drug use. (Union Exhibit 1.)¹ The Directive allows for drug testing where, among other circumstances, there is reasonable suspicion that a drug test will produce evidence of illegal drugs and/or abusive use of drugs. It specifies such reasonable suspicion can be based upon either the

¹ The parties stipulated that the copy of Directive 55 identified as Union Exhibit 1, and not the copy identified as City Exhibit 2, is the controlling version for purposes of this case inasmuch as the former, dated "3-26-09," was the version in effect at all relevant times.

officer's actions, appearance or demeanor or an internal investigation that reveals a likelihood that an officer has used drugs illegally or improperly.

John McGrody, a Union Vice President and its primary contact with the Department on drug testing matters, testified that changes to Directive 55 require the Union's consent. In support of this statement, he cited several examples in which changes proposed by the Department were either implemented only after receiving the Union's approval or not adopted because of the Union's opposition. (Union Exhibits 2 – 4.)

McGrody stressed the importance to the Union of laboratory standards as detailed in Article X of Directive 55. He explained that in agreeing to drug testing, the Union insisted upon assurances that the policy would be fair and balanced with all tests done properly. It feared that an unsatisfactory laboratory could violate its members' rights by reporting false positives, leading, in turn, to unjust dismissals. He pointed out that Article X(D) & (E) mandate that any laboratory used by the Department to perform drug testing must utilize an uninterrupted chain-of-custody procedure and operate in accordance with appropriate quality standards that conform with Pennsylvania law. He also noted that the Drug Testing Advisory Committee, established pursuant to Article XIV and on which he serves as the Union's representative, advises the Commissioner on testing matters, including choice of laboratories.

The circumstances leading to the Department's drug testing of Belciano and his subsequent dismissal began with a report from his estranged wife, S [REDACTED] B [REDACTED]. Lieutenant John Kay, the Commanding Officer of the Internal Affairs Division's Drug Screening Unit, recounted a conversation he had with Ms. B [REDACTED] on February 3, 2010,

in which she reported witnessing her husband regularly taking steroids orally and by injection. She alleged that he had been doing so since October 2009.² She also advised Kay that Belciano had recently assaulted her in the course of an argument causing bruises on her chest and arms. After their conversation, Kay accompanied Ms. B [REDACTED] to her home where she provided him with the following items reportedly belonging to Belciano: (a) a bottle with 48 pills;³ (b) a glass vial labeled "Deca" containing a clear liquid;⁴ (c) numerous syringes and needles; and (d) a Western Union Money Order in the amount of \$208.00 addressed to C [REDACTED] M [REDACTED] in Chisinau, Moldova from J [REDACTED] M [REDACTED], which was allegedly used to purchase steroids from a source in Moldova.

On the basis of this information, Kay ordered Belciano to report to the Internal Affairs Division on February 5, 2010 for a reasonable suspicion drug test. Belciano consented to the test, but declined to respond to the reasonable suspicion information related to him by Kay.

In connection with the testing, Belciano provided a urine specimen, the collection of which was observed by Kay. Sergeant Emilia Crespo of the Drug Screening Unit collected a hair sample from Belciano. Crespo testified the established protocol was followed with the collection and receipt of Belciano's specimens beginning with verifying his identity by examining his Department photo identification card. She also described her preparation of the Employee Drug Screening Report and the Drugscan and

² Despite being subpoenaed, Ms. B [REDACTED] did not appear to give testimony in this matter. Accordingly, her statements to Kay were not received for the truth of the matter asserted, but only for its effect on Kay, including his determination that reasonable suspicion existed to drug test Belciano.

³ An analysis of the pills revealed that they did not contain any commonly encountered controlled substances. Instead, tests indicated the presence of various fatty acids often present in dietary supplements and plant extracts. (City Exhibit 1.)

⁴ Testing of the substance contained in the vial confirmed the presence of the anabolic steroid nandrolone. (City Exhibit 1.)

Omega Laboratories Drug Testing Custody and Control Forms. Finally, she related the process that she followed in sealing, packaging and shipping the vials containing Belciano's specimens to the respective laboratories.⁵ She noted that the employee at the laboratory who receives the specimen confirms his/her identity by signing the custody and control form.

She related that on February 8, 2010, both Drugscan and Omega Laboratories reported that the specimens provided tested negative for the drugs included in the Department's regular testing panel. These include marijuana, cocaine, opiates, phencyclidine, amphetamines, barbiturates, benzodiazepines, methadone, d-propoxyphene, and MDMA.

Kay testified that after providing these results, Drugscan forwarded a separate split sample taken from Belciano's urine specimen to the Aegis Laboratory.⁶ He explained that this was done because Drugscan lacked the capability to test for steroids. He recounted that on February 9, 2010, Aegis reported that the sample tested positive for nandrolone, a Schedule III controlled substance. In addition, Aegis advised that the sample had a T/E ratio of 10.5:1.⁷

On February 23, 2010, Kay notified Belciano in writing that the urine specimen collected from him on February 5, 2010 had tested positive for steroids. This notice also

⁵ The Department uses Drugscan and Omega Laboratories to test urine and hair samples, respectively, for its established panel of illegal drugs.

⁶ Although Crespo did not testify concerning the preparation, packaging and shipping of this separate split sample, City Exhibit 1 includes an Aegis Forensic Drug Testing Custody and Control Form. The form contains both Crespo's and Belciano's signatures, which are each dated February 5, 2010.

⁷ T/E ratio refers to the ratio of Testosterone to Epitestosterone in the sample.

advised Belciano of his right to a reanalysis test as specified in Directive 55. Belciano, however, never requested a reanalysis test.

Further, at Kay's direction, on February 24, 2010, Belciano met with, Dr. George Hayes, the City's Medical Director of Employee Medical Services who functions as its medical review officer for all employee drug testing. Dr. Hayes explained that he interviews all officers who test positive for prohibited drugs to determine whether there are any other potential causes that would not represent a violation of Department policy. To this end, after reviewing and explaining the test results, he asked Belciano whether he had any explanation for the positive finding, including medically supervised use of an androgen-like drug for a therapeutic purpose. Receiving no response from Belciano, Hayes concluded that the positive test result was not consistent with Belciano's recent medical history and/or any stated legitimate medication. (City Exhibit 1.)

Kay testified that after receiving the positive test result from Aegis, he also requested that Dr. R [REDACTED] C [REDACTED], a Drugscan forensic toxicologist, provide a report interpreting the test results.

Dr. C [REDACTED] testified that he concluded from the Aegis test results that Belciano had a non-metabolic level of nandrolone in his system demonstrating that he had used a foreign source of nandrolone. He explained that the level of nandrolone in Belciano's urine sample, which was in excess of 2 ng/ml, could be achieved only by the use of supplements.⁸ He noted further that Belciano's highly elevated T/E ratio of 10.5:1 reflected recent use of a foreign source of nandrolone and far exceeded that which might result from a medically supervised therapeutic use of this drug. Dr. C [REDACTED]'s written

⁸ Although Aegis did not report the specific quantity of nandrolone found in Belciano's urine sample, Dr. C [REDACTED] stated that it had to be in excess of 2 ng/ml, as that is Aegis' cut off level for a positive finding.

opinion to Kay states: "this individual abused this controlled (Schedule III) anabolic androgenic steroid in pharmacologically significant dosage amounts sufficiently high enough (a) to have produced its anabolic effects, and (b) to have potentially produced adverse psychoactive actions." (City Exhibit 1.)

Kay recounted that on March 1, 2010, he directed Belciano to report once more to Internal Affairs for an interview on his positive drug test result. When asked if he could provide any explanation for the positive test result, he declined, on counsel's advice, to make a statement. Accordingly, Kay notified Belciano that based upon the investigation of this matter, he was immediately suspended for a period of thirty days with the intent to dismiss. (City Exhibit 1.)

Police Commissioner Charles Ramsey testified that it has been his universal practice to terminate any officer found to have used drugs illegally, except where the officer has a valid prescription for the drug for which he/she tests positive. He stated, therefore, that after reviewing the record of Kay's investigation, he concluded that Belciano should be dismissed. He explained that his decision was implemented as a "Commissioner's Direct Action" without a PBI hearing. (City Exhibit 3.)

The Department served Notice of Dismissal on Belciano on March 30, 2010. (Joint Exhibit 3.) The notice states that he was being dismissed due to his violation of §1.80 of the Disciplinary Code (i.e., the use a controlled substance other than as prescribed under the care and treatment of a licensed medical practitioner).

This action prompted the instant grievance. When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded

arbitration. Pursuant to their contractual procedures, the parties selected me to hear and decide the case.

I held a hearing in this case on September 8, 2011, at the offices of American Arbitration Association in Philadelphia. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. Upon the conclusion of the hearing, the City provided an oral closing statement. The Union chose instead to submit a post-hearing brief in lieu of a closing statement. With the receipt of the Union's post-hearing brief on November 8, 2011, the hearing record was declared closed.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Police Officer Jason Belciano, effective March 28, 2010?
2. If not, what shall be the remedy?

Positions of the Parties

The City contends that its discharge of Belciano was for just cause. It maintains that the evidence conclusively demonstrates that he was guilty of the Section 1.80 violation as charged.

The City argues that it is an implied condition of any collective bargaining agreement that there are certain offenses of sufficient gravity to warrant dismissal without resort to progressive discipline. It submits that the illegal use of drugs meets this standard. It maintains further that a heightened standard applies in this regard in the case of police officers. It explains that they are responsible for enforcing the drug laws, and

therefore, must strictly comply with those laws, which they are sworn to uphold. It also cites the opinion of Commissioner Ramsey, who has 11 years' experience commanding police departments in two major cities, as substantiating the appropriateness of summary dismissal for any police officer found to have used illegal drugs.

Turning to the evidence of Belciano's illegal drug use, the City cites the testimony of Drs. Hayes and C [REDACTED] as confirming he tested positive for steroids and that the chain of custody of the sample was properly maintained throughout the testing process. As to the accuracy of the results and the integrity of the process, it notes further that Dr. C [REDACTED] opined that Aegis is the top laboratory in the country for steroid testing. It also points out that given the absence of any evidence that Belciano was using the steroid nandrolone pursuant to a valid prescription under the care and treatment of a licensed medical practitioner, it necessarily follows that he engaged in the illegal use of a controlled substance in violation of §1.80 of the Department's Disciplinary Code. It submits that the steroids provided to Kay by Ms. B [REDACTED] corroborate this finding.

The City contends that Belciano's failure to exercise his right to have a reanalysis test done (i.e., test the second half of the split sample) justifies an adverse inference that such testing would have been incriminating. Indeed, it maintains that this is the reason the Union must focus its defense on attacking Aegis and its processes. The City submits, however, that those attacks are without merit.

The City argues that contrary to the Union's assertion, it does not have the right to mandate or veto the Department's selection of a particular testing laboratory, but only to recommend. The choice of laboratories rests with the Department. It submits that the Department cannot be faulted for choosing Aegis given the recommendation of Dr. C [REDACTED].

a forensic toxicologist. It asserts further that the Union has failed to present any valid evidence demonstrating that Aegis was not a proper choice or that it failed to maintain a proper chain of custody.

In sum, the City submits that it has demonstrated by a preponderance of the evidence that Belciano illegally used a controlled substance in violation of §1.80, and therefore, the Department had just cause to discharge him. Accordingly, for these reasons, it asks that Belciano's dismissal be sustained and the Union's grievance be denied.

The Union, on the other hand, maintains that the City lacked just cause to discharge Belciano. The Union submits that the City has failed to meet its burden of proof in this regard.

In pursuing the instant grievance, the Union does not contest the Department's authority to dismiss police officers that use illegal drugs. Indeed, the Union expressly states that it abhors such activity by its members. However, it maintains that Belciano's discharge for using steroids must be reversed because the testing process on which the Department relies to make its case lacks the elements necessary to ensure fundamental fairness.

The Union asserts that Aegis is not an authorized laboratory for drug testing, and therefore, any results produced by it cannot be relied upon to establish just cause for discharge. It reasons that the selection of Aegis to test for steroids in this case represents a modification of the Department's drug testing policy. As such, it required the Union's consent, which was never given. Indeed, it points out that the Union was not given any advance notice of the selection of Aegis. Further, citing Dr. C [REDACTED]'s testimony, it

suggests that Drugscan, without notice to the Department, decided to have Aegis perform the steroid testing of Belciano's urine sample.

It stresses that that this is no minor modification that can be excused. Quite the opposite, it cuts against the mutual trust of the parties that lies at the heart of the policy and is grounded in a system of checks and balances that ensures the testing is done properly and fairly. Here, the Union was deprived of the opportunity to vet Aegis' capabilities and qualifications. The Union cites Article X(A) of Directive 55 as confirming the parties' understanding as to the importance of specific controls as to the laboratory selected to conduct drug testing.

The Union argues that the gravity of the Department's failure to consult with and obtain its assent to the use of Aegis is heightened by the existence of a Drug Testing Advisory Committee established pursuant to Article XIV of Directive 55. The very purpose of this committee, it notes, was to discuss such matters as the selection of testing facilities. It also points to the parties' history of bargaining over revisions to Directive 55.

Finally, the Union asserts that test results produced by Aegis cannot be accepted because a proper chain of custody has not been established. It reasons that the documentary evidence introduced by the City for this purpose lacks an adequate evidentiary foundation.

Accordingly, for all these reasons, the Union asks that the grievance be granted and the City be directed to reinstate Belciano with full make whole relief.

Opinion

This much is beyond dispute: the Department is certainly entitled to expect its officers will strictly comply with the drug laws that they are sworn to uphold and enforce. It follows logically that officers who breach this obligation by using illegal drugs can and should expect that discharge will result. Indeed, the Union concedes as much.

The City, of course, bears the burden of proof here. It must demonstrate by a preponderance of the credible evidence that Belciano committed the charged offense. The Union, on the other hand, has no corresponding burden. It need not disprove the charges against Belciano. Indeed, he is entitled to the presumption of innocence.

On review, the record convinces me that the City has not met its burden. My reasons for this conclusion follow.

This case turns entirely on whether I can credit Aegis' report as substantiating that Belciano tested positive for the steroid nandrolone. In order to do so, I must conclude that the findings reported by Aegis are sufficient to support the conclusion of a positive nandrolone test result. In addition, I must be convinced as to the integrity of the testing process.

In regard to the latter, the Department has an absolute obligation to follow strictly the procedures detailed in Directive 55. Those procedures are critical to ensuring the accuracy and integrity of the testing process and the results generated. That certainly includes the requirement to ensure an unbroken chain of custody from the beginning to the end of the process.

I am satisfied that there was strict adherence to the chain-of-custody requirement in the transfer of the two samples between the Department and Drugscan. I cannot reach

the same conclusion as to the transfer of the second split sample between Drugscan and Aegis. Nothing in the record establishes that Drugscan protected the chain of custody in receiving and then releasing that second split sample to a courier for shipment to Aegis. As the Department's agent in this process, Drugscan had the very same obligation to ensure strictly that there was no break in the chain of custody.

This procedural deficiency does not cause me to take issue with the conclusion that the findings reported by Aegis substantiate a positive test result for nandrolone. Instead, it demonstrates the lack of reasonable certainty that the urine sample tested by Aegis was actually Belciano's.

I note the Union's argument that the Department's unilateral selection of Aegis to perform steroid testing here was improper. However, I do not need to decide that issue. Regardless of whether Directive 55 grants the Department the discretion to select the testing laboratories, any laboratory selected must still satisfy the requirements specified in the Directive. I find the record evidence presented provides an insufficient showing as to Aegis's qualifications.

Specifically, Article X(A) states that a selected testing laboratory "will meet the Departmental contract specifications, which will ensure results that are legally supportable and scientifically accurate." In addition Article X(E) provides that the testing laboratory must be "subjected to appropriate external proficiency-testing and internal quality assurance procedures for evaluating the performance of its testing process and procedures," and "such procedures must be in conformance with Pennsylvania law and contract specifications."

I find Dr. C [REDACTED]'s testimony inadequate to demonstrate that Aegis meets these requirements. His statement concerning Aegis's reputation as the premier laboratory in the country for steroid analysis, while quite possibly true, simply cannot substitute for proof that its process and procedures satisfy the dictates of Directive 55. Moreover, it was apparent to me from Dr. C [REDACTED]'s testimony that he simply did not possess the necessary direct personal knowledge to vouch for Aegis in this regard. Nor did any of the City's other witnesses. Therefore, while its entirely possible that Aegis might be an acceptable testing laboratory under Directive 55, the record evidence simply falls short in substantiating that fact.

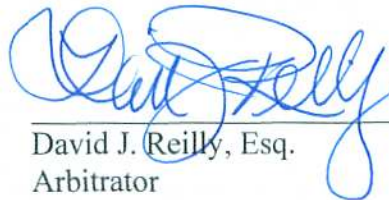
I have little doubt that the identified procedural failings stem from the fact that this was the first time that the Department was conducting a reasonable suspicion test for steroids. Nonetheless, however understandable these errors may be, I cannot ignore them and credit the Aegis test results. As I stated above, these procedural failings are no mere technical violations, but involve matters that go to the very the integrity and the accuracy of the process.

Accordingly, for these reasons, I grant the Union's grievance and direct the Department to reinstate Belciano to his former position without loss of seniority. However, as to the Union's request for a make whole remedy, I remand the issue conditionally to the parties and direct that they promptly meet and confer in an effort to reach agreement resolving that matter. In the event that they are unable to reach an agreement within the next sixty days, they are directed to return to me for a ruling on the issue.

AWARD

1. The grievance is granted.
2. The City did not have just cause to discharge Jason Belciano, effective March 28, 2010.
3. The City will promptly reinstate Jason Belciano to his former position within the Department without loss of seniority.
4. I will retain jurisdiction on the issue of the Union's request for a make whole remedy. The parties are directed to return to me for a ruling on that issue if within sixty days of the date of this award they are unable to reach an agreement resolving the issue.
5. The Department will revise Jason Belciano's personnel record consistent with the terms of this award, including deleting all reference to the discharge from his disciplinary record.

December 8, 2011

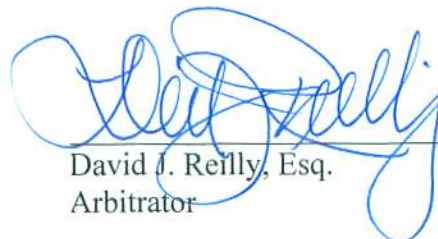


David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

December 8, 2011



David J. Reilly, Esq.
Arbitrator